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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNIONS NOS. 141, 229, 681, and 706,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether § 14(b) of the National Labor Relations Act permits the states to make unlawful an agreement between an exclusive bargaining representative and an employer requiring nonmembers within the bargaining unit to pay a fee limited to their pro rata share of the costs for "enforcing and servicing the collective bargaining agreement"—services that federal law requires the exclusive bargaining representative to provide to nonmembers as well as to members.

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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The International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions Nos. 141, 229, 681 and 706 (hereinafter collectively referred to as "the Union") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *The International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions Nos. 141, 229, 681 and 706 v. N.L.R.B.*, 675 F.2d 1257.

OPINIONS BELOW

The decision and order of the National Labor Relations Board in this case and the decision of the Administrative Law Judge are reported at 252 NLRB 1299, and are reprinted in the separately bound appendix to this petition as Appendix C and Appendix D. The decision of the court of appeals from which a writ of certiorari is sought is reported at 675 F.2d 1257, and is reprinted as Appendix A.

JURISDICTION

The court below issued its opinion and judgment in this case on April 16, 1982. That court issued an order denying a timely petition for rehearing on June 2, 1982. (A copy of that order is reprinted as Appendix B (54a)). On August 24, 1982, Chief Justice Burger entered an order extending the time for filing this petition to and including October 15, 1982. (A copy of that order is reprinted as Appendix E (82a)). On October 10, 1982, Chief Justice Burger entered an order further extending the time for filing this petition to and including October 30, 1982. (A copy of that order is reprinted as Appendix F (84a)). This Court has jurisdiction to review the judgment of the District of Columbia Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 8(a)(3) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 158(a)(3), provides as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> • • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United

States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. . . .

Section 8(b)(3) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 158(b)(3), provides as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . .

Section 14(b) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 164(b), provides as follows:

(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

STATEMENT OF THE CASE

A. The Facts

In 1974, Local 681, the exclusive bargaining representative for pipefitters at the International Paper Company's (hereinafter "the Company") plant in Natchez, Mississippi, added an annual assessment to the then existing union dues. In response to that additional assessment, Local 681's membership at the Natchez plant declined from 38 to 1, and the remaining member was not required to pay any dues by virtue of his position as shop steward. Despite the loss of all dues paying members at the Natchez plant, Local 681 was still required to meet all of its statutory representational responsibilities as exclusive representative of the pipefitters at that plant. And, in fact, Local 681 expended thousands of dollars in meeting those responsibilities during the period when none of the pipefitters at the Natchez plant was paying dues.

In May of 1977, the Union opened negotiations with the Company for a new contract. These negotiations covered pipefitters at the Company's plants in Louisiana, Florida, and Arkansas, as well as the Natchez, Mississippi plant. In an effort to address the problem that was so graphically illustrated by the Natchez situation, the Union proposed the following clause (App. 3a-4a):

> The costs and expenses of representing all members of the bargaining unit, without regard to union affiliation or lack of same must be borne by all bargaining unit employees.
>
> Those unit employees who voluntarily choose not to become union members shall be required to contribute a pro-rata share of the costs and expenses incurred by the union that are directly related to enforcing and servicing the collective bargaining agreement. The representation fee will apply only when a collective bargaining agreement is in effect. Furthermore, in no case will the fee exceed the dues and assessments required of union members.

> Failure of any *permanent* employee to make payment of the representation fee each month and to maintain the payments during employment under this agreement shall constitute grounds for dismissal after ten (10) days written notice to the employee and the company.
>
> The amount of the representation fee will be based upon an independent audit to determine those services performed by the union directly related to the collective bargaining process. . . .

The Company and the Union reached agreement on all other contract provisions, but the Company rejected the above-quoted clause as violative of the right-to-work laws of Arkansas, Florida, Louisiana, and Mississippi.[1] The Union informed the Company that without the "repre-

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[1] Ark. Stat. Ann. § 81-202 provides in pertinent part:

> No person shall be denied employment because of membership in, or affiliation with, a labor union . . . nor shall any person unless he shall voluntarily consent in writing to do so, be compelled to pay dues, or any other monetary consideration to any labor organization as a prerequisite to, or condition of, or continuance of, employment.

Fla. Const. Art. I § 6 provides:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in a labor organization.

See *Florida Education Ass'n. v. Pub. Empl. Rel. Com.*, 346 So.2d 551 (Fla. App. 1977) (construing Art. I § 6 to prohibit a requirement that nonunion members pay their pro rata share of bargaining and grievance costs).

La. Rev. Stat. Ann. § 23:983 provides:

> No person shall be required, as a condition of employment, to become or remain a member of any labor organization, or to pay any dues, fees, assessments, or other charges of any kind to a labor organization.

Miss. Const. Art. VII and Miss. Code Ann. § 71-1-47 provide:

> No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

sentation fee" clause there would be no agreement, and further advised the Company of its intention to commence picketing at the Natchez plant. Thereupon, the Company filed an unfair labor practice charge, alleging that the Union had insisted to the point of impasse upon a clause violative of the "right-to-work" laws of the four states mentioned above in violation of § 8(b)(3) of the National Labor Relations Act (hereinafter "the Act").

B. Proceedings Below

At the hearing upon the Company's unfair labor practice charge, the administrative law judge ruled that the "representation fee" clause in question would be lawful under § 8(a)(3) of the Act and would, in the absence of the right-to-work laws, be a mandatory subject of bargaining. The ALJ further ruled, however, that § 14(b) of the Act permits the states to prohibit "representation fees" of the type sought by the Union, and that the four states involved here had enacted such prohibitions. Accordingly, the ALJ found the Union by insisting to the point of impasse on the "representation fee" clause to have violated § 8(b)(3), and issued recommended relief for that violation. A three-member panel of the National Labor Relations Board (hereinafter "the Board") affirmed the ALJ's opinion and adopted his recommended remedy.

The Union filed a petition for review of the Board's decision in the District of Columbia Circuit, and the Board filed a cross petition for enforcement of its order. The court granted enforcement of the Board's order, with Judge Mikva dissenting. The majority recognized that the issue presented by this case is one left open in *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 746. (App. 9a). But the majority concluded that the rationale by which the Court in *Schermerhorn* decided that an agency shop—requiring employees in the bargaining unit who are not union members to pay an amount equal to union dues—is subject to state prohibition under § 14(b), would

require the same result where a union seeks to charge non-members a fee, less than union dues, for services rendered to them in "enforcing and servicing the collective bargaining agreement." (App. 3a, 9a-10a). The majority also pointed to legislative history showing that Congress intended § 14(b) to permit the states to prohibit "compulsory unionism" as supportive of the result reached below. (App. 6a-8a). Judge Mikva in dissent, reviewed at length the legislative history of § 14(b), this Court's decisions, and the decisions of other circuits in related cases and reached the opposite conclusion.

REASONS FOR GRANTING THE WRIT

The question presented in this case, concerning the legality in "right-to-work" states of a clause in a collective bargaining agreement requiring employees who are not union members to pay a fee, less than union dues, for services rendered to them in "enforcing and servicing the collective bargaining agreement," is, as the court below recognized, a question left open by this Court (App. 9a):

> The Union's 'representation fee' is a 'less stringent union-security arrangement' than the fee in [*Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746] because it is not set to equal union dues. The representation fee thus escapes *Schermerhorn's* holding. . . .

It is also a question of great import in labor management relations. For federal law imposes on exclusive bargaining representatives heavy obligations running to all employees in the bargaining unit, and the costs of meeting those obligations are substantial. To require a union to, for example, process a grievance for an employee without providing the union a means to require that employee to pay his share of the attendant costs is

either to place the entire financial burden of processing that grievance on the union's members who are not directly involved or in the long run to jeopardize the union's ability to serve as an exclusive collective bargaining representative. The first of these consequences is inequitable and tends to discourage the exercise of the § 7 right to form and join labor organizations. The second of these consequences is squarely contrary to the national labor policy, as stated in § 1 of the Act, to encourage the practice and procedure of collective bargaining. And, as we show, this important question was wrongly decided below.

1. In *Schermerhorn*, the Court dealt with a contract clause that imposed on nonmembers within the bargaining unit "the obligation to pay initiation fees and regular dues [which] is the 'practical equivalent' of an 'agreement requiring membership in a labor organization as a condition of employment' "—a clause the Court termed an " 'agency shop' arrangement." 373 U.S. at 751. Because of this practical equivalence, the Court held that "[w]hatever may be the status of less stringent union-security arrangements, the agency shop is within § 14(b)" (*id.* at 751-752) and may pursuant to the permission stated in that section be prohibited by state law.

The union in that case "belatedly" had made an attempt to characterize the nonmember payments involved in that case as merely a fee for costs incurred by the union in meeting its legal obligations as exclusive bargaining agent. *Id.* at 752. The Court rejected that belated characterization as unsubstantiated by the record in the case. The Court pointed out that the nonmember fees could be used directly to finance the union's "institutional" expenditures as well as its collective bargaining expenses. And even if that were not true, the Court concluded that nonmembers would necessarily be compelled to contribute to "institutional" expenses of the union: "the service

fee is admittedly the exact equal of membership initiation and monthly dues"; and "dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining' "; therefore, "collective bargaining services [would] cost the nonmember more than the member" and "[b]y paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities." *Id.* at 753-754.

The clause at issue in the instant case is entirely distinct from the *Schermerhorn* clause in all the foregoing respects. The clause proposed by the Union here requires nonmembers only "to contribute a pro-rata share of the costs and expenses directly related to enforcing and servicing the collective bargaining agreement." App. 3a. And "[t]he amount of the representation fee will be based upon an independent audit to determine those services performed by the union directly related to the collective bargaining process." App. 4a. Except in the entirely unlikely event that the independent audit showed the union to have no expenses other than those attributable to enforcing and servicing the collective agreement, the representation fee would be less than dues; and, in no event could the nonmember's contribution be used for expenses other than the expenses of enforcing and servicing the agreement. The clause here is thus *not* "the 'practical equivalent' of an 'agreement requiring membership in a labor organization as a condition of employment.' " 373 U.S. at 751. It is, in the words of *Schermerhorn*, a "less stringent union-security arrangement" than the agency shop. *Id.* at 752.

2. The decision below is of great practical importance to all unions functioning in the 20 "right-to-work" states. As Judge Mikva pointed out in dissent below, this Court has in a series of decisions held that a union's election as exclusive bargaining agent carries with it a statutory duty

"to represent all employees in the bargaining unit, whether union or nonunion. See e.g. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564-65 . . .; *Humphrey v. Moore*, 375 U.S. 335, 342. . . ." App. 14a. See also, *Vaca v. Sipes*, 386 U.S. 171; *Steele v. Louisville & N.R. Co.*, 323 U.S. 192. As the record in this case shows, meeting that statutory duty, in enforcing and servicing the collective bargaining agreement—particularly in the grievance arbitration process—requires unions to incur significant monetary expenses. And, as the record also shows, workers no less than anyone else are tempted by the prospect of getting valuable guaranteed services for nothing.

If unions are required by federal law to provide such services to nonmembers, but at the same time cannot require nonmembers to pay for the services, unions will, at the least, be hampered in their ability to meet their federal law obligations. And the result may well be that some unions in right-to-work states will not be able to provide either members or nonmembers the quality of services contemplated by the federal labor laws. Certainly the result will be to shift inequitably the cost of providing such services as are required for nonmembers to the union's members. This Court should determine whether Congress in enacting § 14(b) meant to bring about such untoward results.

3. There is strong evidence in the legislative history that Congress meant no such result. Judge Mikva's dissent reviews the legislative materials in full, and we set out here for the Court's convenience the essence of his conclusions (App. 32a-37a, footnote omitted):

> By enacting section 14(b) in 1947, Congress reiterated the point that it had not been the intention of the [1935] Congress "to override State laws regulating the closed shop." S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947).
>
> • • • •

[T]he predominant if not the only purpose of section 14(b) was to provide yet one more check on the abuses that could exist under "compulsory unionism."

The crucial point to be drawn from the legislative history of section 14(b), however, is that Congress never specifically defined what it meant by "compulsory unionism." . . .

The best evidence of the congressional intent may therefore lie in the kinds of "compulsory unionism" that members of Congress understood had been banned by the state right-to-work laws. . . .

* * * *

[I]n the [House and] Senate, the emphasis was on state laws prohibiting the closed shop. [For example] Senator Taft defended the section 8(3) proviso, noting that it "did not in any way prohibit the enforcement of State laws which already prohibited closed shops." *Id.* at 6520. His summary of the bill explained that section 14(b) would allow states to prevent "compulsory union membership agreements" where such agreements violated state laws. . . . At no time, in the committee reports or during the debates, was it intimated that "compulsory unionism" meant anything more than the closed shop, union shop, and conceivably contracts requiring maintenance of membership or preferential hiring of union members.

One final observation, if an obvious one, should be made about the legislative history of section 14(b). The debates make it clear that Congress knew that several states had banned the closed and union shop, but the legislative history does not suggest that Congress knew these laws sometimes prohibited payment of "any dues, fees or charges of any kind to any labor union" as well. Congress emphatically did not intend to give the states a free hand in amending federal labor law. . . .

* * * *

Had Congress chosen, it could have framed section 14(b) in terms identical to existing state right-to-work laws. Employers could have been precluded from making agreements "requiring membership in or payments of any kind to a labor organization," rather than those simply "requiring membership in a labor organization." On its face, section 14(b) is by no means as broad as the more restrictive state laws that the majority opinion now suggests it incorporated. Congressional attention focused on closed shops and union shops, which were said to place workers at the mercy of capricious or corrupt treatment by labor organizations. Section 14(b) was meant to extend associational freedom to employees in states that had passed legislation dealing with this subject. But the Taft-Hartley Act did not adopt the philosophy that labor unions should be destroyed. Nothing in the legislative history of section 14(b) suggests that Congress meant to give this power to the states.

4. The decision below is inconsistent with the theory of the decisions holding that service fees charged to non-members by union-operated hiring halls do not violate the core prohibition of § 8(a)(3).

Schermerhorn establishes that § 14(b)'s purpose is to expose to state prohibition arrangements that can pass muster under § 8(a)(3) solely because they satisfy the requirements of § 8(a)(3)'s *proviso—i.e.*, arrangements that violate the core prohibition of § 8(a)(3) ("discrimination . . . to encourage or discourage [union] membership") but that are preserved as valid by the proviso which sanctions "agreement[s] . . . to require as a condition of employment membership" in the union. 373 U.S. 751. In the hiring hall context, a service fee charged to non-members by a union operated hiring hall has been held not to "encourage or discourage" union membership and hence not to violate the core prohibition

of § 8(a)(3). *Local 825, IUOE*, 137 NLRB 1043 (1962); *Local 1351, Steamship Clerks v. NLRB*, 329 F.2d 259 (D.C. Cir. 1964), *cert. denied*, 372 U.S. 993; *NLRB v. Local 138, IUOE*, 385 F.2d 874 (2nd Cir. 1974).[2] Under *Schermerhorn* then, such fees are not within the ambit of § 14(b)'s permission to the states to invalidate certain union security arrangements.

By the same analysis, the representation fee in the instant case does not violate the core prohibition of § 8(a)(3), for it does not encourage or discourage union membership. Under the clause proposed by the Union in the instant case, nonmembers would pay only for services that the union must provide on an even-handed basis to all employees without regard to union membership, and the amount nonmembers would pay would be less than Union dues. Unlike the situation where the full payment of dues is required, in which case an employee would be encouraged to join the Union in order to take full advantage of his payment, here an employee would have to pay an additional amount to become a member and thus would have no more incentive to join the Union if the fee were charged than if there were no fee. Thus, like the service fee in the hiring hall context, the representation fee here is outside the ambit of § 14(b).

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[2] The majority below sought to distinguish the hiring hall cases on the ground that § 14(b) is concerned only with the treatment of employees after hire, while the arrangements involved in those cases related to pre-hire treatment. The distinction rests on a false premise, for Congress clearly intended that § 14(b) would invest the states with jurisdiction (concurrent with the NLRB's) to outlaw the *closed shop*—an arrangement that requires union membership *prior to hire*. See H. Conf. Rept. No. 510 on H.R. 3020, 80th Cong., 1st Sess., 60 (1947). It is thus not correct that § 14(b) is unconcerned with pre-hire conditions, and the hiring hall decisions cannot be distinguished on that ground.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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